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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 855.

LLOYD FRANKEL,

Petitioner.

VS.

BETHLEHEM-FAIRFIELD SHIPYARD, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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INDEX

	PAGE
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
POINTS OF ARGUMENT	2
ARGUMENT	2-15
1. The District Court did not have jurisdiction over the parties	2
2. Petitioner was not a seaman within the meaning of the Jones Act	4
3. Shipbuilding is a matter of local concern	14
CONCLUSION	15

TABLE OF CASES

Alaska Packers Ass'n v. Industrial Accident Commission, et al., 276 U. S. 467	7
Alaska Packers Ass'n v. Marshall, 95 Fed. 2d 279	12
Arundel Corporation v. Ayres, 169 Md. 569	3
Asselin v. Blount, 14 Atl. 2d 696	10
Asselin v. Blount, 16 Atl. 2d 328	11
Baizley Iron Works, et al., v. Span, 281 U. S. 222	13
Davis v. Department of Labor and Industry of Washington, Supreme Court Reporter Volume 63, No. 4, January 1, 1943, page 225	10
Dawson v. Jahncke Drydocks, Inc., 131 So. 743	11
Dewey Fish Company v. Department of Labor and Industries of State of Washington, 41 Pac. 2d 1099	13
Dourrieu v. Board of Commissioners of Port of New Orleans, 158 So. 581	11
Ex parte Rosengrant, 104 So. 409, 273 U. S. 664	11
Frankel v. Bethlehem-Fairfield Shipyard, Inc., 132 Fed. 2d 634	13

PAGE

Grant Smith-Porter Ship Company v. Rohde, 257 U. S. 469 ..... 5, 6, 7, 8, 9, 10, 14

Herbert's, 186 N. E. 554 11

Just v. Chambers, 312 U. S. 383 9

Lahti v. Terry and Tench Company, Inc., 148 N. E. 527, 273 U. S. 639 11

London Guaranty and Accident Company, Ltd., v. Industrial Accident Commission of California, et al., 279 U. S. 109 8

Los Angeles Shipbuilding and Drydock Company v. Industrial Accident Commission of California, 207 Pac. 416 12

Miller's Underwriters v. Braud, 270 U. S. 59 ..... 6, 7, 10, 11

O'Donnell v. Great Lakes Dredge and Dock Company, 1942 Term, U. S. Supreme Court, Volume 87, No. 8, page 456 13

Red Cross Line v. Atlantic Fruit Company, 264 U. S. 109 6

Sultan Railway and Timber Company v. Department of Labor and Industries of the State of Washington, 277 U. S. 135 8

Thames Company v. "Francis McDonald", 254 U. S. 242 3

Travelers Insurance Company v. Bacon, 119 S. E. 458 11

U. S. Casualty Company v. Taylor, 64 Fed. 2d 521, 290 U. S. 639 9

Zahler v. Department of Labor and Industries, 217 Pac. 55 12

TABLE OF STATUTES

Flack's Annotated Code, Article 101, Section 33, subsections 8 and 9 3

TABLE OF TEXT BOOKS

Benedict on Admiralty, 6th Edition (Knauth), Volume 1, section 30 3

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OPINIONS BELOW.

The opinion of the United States Court for the District of Maryland is reported in 46 Fed. Supp. 242, and the opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 132 Fed. 2d 634.

STATEMENT OF THE CASE.

The Petitioner has applied for a writ of certiorari to this Court, claiming that he is a seaman and that the case is within the jurisdiction of the Admiralty Court and

seeks recovery under the Jones Act. The Petitioner filed suit for personal injuries which he alleged he received while he was installing machinery on the SS Patrick Henry, which vessel at the time of the happening of the accident was lying in the port of Baltimore. The vessel had been launched but had not been completed. The Respondent filed a motion to dismiss the complaint assigning as reasons: (1) That the District Court did not have jurisdiction over either of the parties, (2) That the Petitioner was not a seaman within the meaning of the Jones Act, and that whatever remedy he had was under the Workmen's Compensation Law of the State of Maryland. The Respondent was engaged in shipbuilding at the time of the accident. The Petitioner was employed as a handy man and was engaged in installing dynamos in the engine room of the vessel.

POINTS OF ARGUMENT.

1. The District Court did not have jurisdiction over the parties.

2. The Petitioner was not a seaman within the meaning of the Jones Act.

3. Shipbuilding is a matter of local concern.

ARGUMENT.

1. The District Court did Not have Jurisdiction over the Parties.

We respectfully urge that the District Court did not have jurisdiction over the parties in this case. The legislature of Maryland expressly provides for a situation of this kind by including shipbuilding within the terms of the Compensation Act as an extra-hazardous employment.

Flack's Annotated Code, Article 101, Section 33, subsections 8 and 9 are as follows:

> "8. The operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the Company.
>
> "9. Shipbuilding, including construction and repair in a ship yard or elsewhere, not included in paragraph 8."

It has been held that the remedy provided by the State for injuries in extra-hazardous employment is exclusively confined to the Workmen's Compensation Act.

Arundel Corporation vs. Ayres, 169 Md. 569.

There is no dispute with reference to the character or kind of business in which the Respondent is engaged. As both parties were engaged in the construction of ships, the project was strictly non-maritime in its nature. It has been held by this Court that a contract for the complete construction of a ship is non-maritime. Mr. Justice McReynolds, speaking for this Court in the case of Thames Company vs. "Francis McDonald", 254 U. S. 242, stated on page 243:

> "Under the decisions of this Court the settled rule is that a contract for the complete construction of a ship or supplying materials therefor is non-maritime and not within the admiralty jurisdiction."

Benedict on Admiralty, 6th Edition (Knauth), volume 1, section 30, on page 65, states:

> "Injuries received on navigable waters in the course of a non-maritime employment (such as the original construction or outfitting of a vessel though already launched) may be comprehended within a State workmen's compensation act, at least if it be of an elective character so that the employer and employee contract with reference to the State law."

Since the sole business of the Respondent is the construction of ships, the Petitioner, in seeking employment, must have done so with the full realization that his work was to be the construction of vessels.

2. Petitioner Was Not a Seaman Within the Meaning of the Jones Act.

We respectfully submit that the Petitioner was not a seaman within the meaning of the Jones Act. He was engaged in the construction of ships, and ship building is distinctly non-maritime. It has never been contended by the Petitioner either in the District Court or in the Circuit Court of Appeals for the Fourth District that any of his duties were of a maritime nature. He was not a member of the crew of the vessel, SS Patrick Henry, on which he was working at the time of his injury. It must, therefore, be conceded by the Petitioner that he did not have any duties which in their nature were maritime or in anywise connected with the sea. The Petitioner invokes the Jones Act on the sole ground that at the time of the happening of the accident the vessel on which he was working was lying in navigable waters. It is admitted by the Petitioner that the vessel was not completed and that she had not been commissioned.

While it is true that this Court has held that injuries occurring on navigable waters of the United States are within the admiralty jurisdiction, there has, however, in recent years, for very obvious reasons, been an exception to this often expressed rule. The exceptions are based principally, if not solely, on the fact that the work in which the workman was engaged at the time of the injury was non-maritime in its nature, such as shipbuilding, or that his work was not in furtherance of navigation or commerce.

Congress passed in 1920 the Merchant Marine Act, sometimes known as the Jones Act, giving seamen the same rights and remedies as an employee of a railroad company under the Federal Employers Liability Act.

In March of 1927, Congress, to bridge a gap, passed the Longshoremen's and Harbor Worker's Act. This Act was expressly designed to limit and narrow the Jones Act and confine it to those injured in maritime employment on navigable waters where the various states might not otherwise provide for such injuries.

The Petitioner referred to this Act in the District Court and in the Circuit Court of Appeals and in his Petition for the writ of certiorari. We have never contended, nor has the Petitioner contended, that the Jones Act is applicable. It will, therefore, serve no useful purpose to discuss its applicability or non-applicability to the issues involved in this case.

This Court recognized even before the passage of the Jones Act that a situation might occur where a person would be injured on navigable waters while building a ship, or engaged in some non-maritime employment and recognized the fact that the various states could adequately provide remedies for such injuries.

The first of these cases was that of Grant, Smith-Porter Ship Company vs. Rohde, 257 U. S. 469, Mr. Justice McReynolds, speaking for this Court, stated on pages 475 and 476:

> "The contract for constructing 'The Ahala' was non-maritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce. The injury was suffered within a State whose positive enactment prescribed an exclusive remedy therefor."

This Court thus expressly ruled that a state Workmen's Compensation Law providing a remedy for injuries sustained under the circumstances of the Rohde case did not conflict with the substantive maritime law. The Rohde case was quoted with approval by this Court in Red Cross Line vs. Atlantic Fruit Company, 264 U. S. 109, page 125. Mr. Justice Brandeis stated:

> "The Workmen's Compensation Laws involved in other cases were upheld because their provisions as applied, were found not to be in conflict with any essential feature of the general maritime law."

Again, in the case of Miller's Indemnity Underwriters vs. Nelson Boudreaux Braud, 270 U. S. 59, Mr. Justice McReynolds, speaking for this Court, on page 64, stated:

> "We said the cause was controlled by the principle that, as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by state statutes."

It is noteworthy in this connection that in the Grant Smith-Porter Ship Company Case, supra, there was a provision of the Compensation Law of the State of Oregon that employers and employees to be within the Compensation Law must make certain payments into the state fund, the employer deducting a certain sum of money each week from the employees and paying that money into the state fund, thereby electing to come within the Compensation Law of Oregon.

The Compensation Law of Maryland is not elective, and it is the only and sole remedy for those engaged in the extra-hazardous employments listed therein.

In the Miller's Indemnity Underwriters vs. Nelson Boudreaux Braud, supra, page 64, Mr. Justice McReynolds stated:

> "Stressing the point that the parties were clearly and consciously within the terms of the statute and did not in fact suppose they were contracting with reference to the general system of maritime law, we alluded to the circumstance, not otherwise of special importance, that each of them had contributed to the industrial accident fund."

Therefore, the fact that the Compensation Law of the State of Maryland is not elective, is of no importance.

In the case of Alaska Packers Ass'n vs. Industrial Accident Commission, et al., 276 U. S. 467, this Court affirmed the doctrine announced in Grant Smith-Porter Ship Company vs. Rohde, Miller's Indemnity Underwriters vs. Nelson Boudreaux Braud, supra. In the Alaska case the Accident Commission of California made an award of compensation, although the injury occurred while the injured man, Peterson, endeavored to push into navigable waters a stranded boat twenty-six feet long and theretofore used by him and others for taking fish. The purpose was to float it to the dock in order that it might be lifted thereon and stored for the winter.

This Court, through Mr. Justice McReynolds, on page 469, stated:

> "Whether in any possible view the circumstances disclose a cause within the Admiralty jurisdiction, we need not stop to determine. Even if an affirmative answer be assumed the petitioner must fail. Peterson was not employed merely to work on the bark or the fish boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in

> any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law."

In the case of Sultan Railway and Timber Company vs. Department of Labor and Industries of the State of Washington, 277 U. S. 135, Mr. Justice Van Devanter held that logging operations, a part of which consists in putting sawlogs into booms after they had been thrown to a navigable river so they might conveniently be towed elsewhere for sale, was under the Workmen's Compensation Law of the State of Washington.

On page 137 he stated:

> "In both instances the place of work is on navigable water—in one it is done before actual transportation begins and in the other after the transportation is completed.
>
> It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

In the case of London Guaranty and Accident Company, Ltd., vs. Industrial Accident Commission of California, et al., 279 U. S. 109, Mr. Chief Justice Taft reviewed a number of decisions and in commenting upon the Rohde Case, supra, and other cases, stated on page 121:

> "Nothing in these cases could apply to the case before us. They may be said to be of an amphibious character. They have an admiralty feature about them in the locality where they occurred, although even this is doubtful with respect to the Alaska Case.

> But the contract in the Rohde case was non-maritime, the ship was incomplete, and being completed under a non-maritime contract; both parties had made a non-maritime contract with reference to their liability and not in contemplation of the Admiralty Law. The Braud Case was one of a maritime tort. But it had no characteristic feature of the general maritime law except locality, and it was very like, in its relation to the state law, to the Rohde case. The employment was not maritime, and the transaction and the circumstances thus seemed to have but one characteristic that was maritime. This was true of the Sultan Company case."

It is worthy of note at this point that although the Rohde case was decided prior to the enactment and passage of the Jones Act, it was in force at the time these later cases were decided.

In the case of United States Casualty Company vs. Taylor, 64 Fed. 2d 521, (certiorari denied, 290 U. S. 639), the Court on page 525 stated:

> "These cases make it clear that a state had the power to provide compensation for injuries suffered by a workman employed in the construction of a vessel afloat upon navigable waters."

In denying the writ of certiorari, this Court certainly affirmed this doctrine.

Again, in the case of Just vs. Chambers, 312 U. S. 383, Mr. Chief Justice Hughes, speaking for this Court, on page 388, stated:

> "With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a Court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."

Among the cases cited to support this statement were Grant, Smith-Porter vs. Rohde and Miller's Indemnity Underwriters vs. Nelson Boudreaux Braud, supra.

In the case of Davis vs. Department of Labor and Industry of Washington, Supreme Court Reporter volume 63 No. 4, January 1, 1943, page 225, this Court held that the decedent, a structural steel worker, who was drowned in the Snohomish River while working as an employee of the Mansion Construction and Engineering Company was entitled to compensation under the Compensation Law of the State of Washington. The deceased was to help to dismantle an abandoned draw bridge, it was lowered to a barge by a derrick and when loaded, the barge was to be towed by a tug. Three vessels had been brought there along the stream for use by the employer. Deceased had helped cut some steel from the bridge and at the time of the accident was working on the barge which had not yet been completely loaded for its first carriage. In this case recovery was sought under the Longshoremen's and Harbor Worker's Act but this Court held that the remedy was under the Workmen's Compensation Law of the State of Washington.

It is interesting to note that a number of the states following the Grant, Smith-Porter case, supra, have held that the Workmen's Compensation Law applies even though the injury occurred on a vessel in navigable waters when the employment and nature of the work was not maritime and when the work was not an aid to navigation or commerce. We refer to the case of Asselin vs. Blount, 14 Atl. 2d 696. This is a Rhode Island case in which the decedent was drowned in the Assonet River. At the time of his death, the decedent was operating a small motor boat which sank about one-eighth of a mile from the point

where the Assonet River joins the Taunton River. The employer was engaged in the business of cultivating and distributing oysters. The state compensation law was held to apply. Later a petition for reargument was filed and denied. Asselin vs. Blount, 16 Atl. 2d 328.

In Ex parte Rosengrant, 104 So. 409, the deceased was killed while engaged in checking lumber. At the time of his death, he was standing on a schooner moored in navigable waters, and was tallying and grading lumber which was being unloaded from a barge into the mill. The operation of checking involved getting the lengths and sizes of the lumber. The deceased was not doing any of the physical labor of moving the lumber. The defendant was running a planing mill. The contract was not maritime in its nature. The state compensation law was held to apply. A writ of certiorari to this Court was denied, 273 U. S. 664.

Other cases to this same effect are Dawson vs. Jahncke Drydocks, Inc., 131 So. 743; Dourrieu vs. Board of Commissioners of Port of New Orleans, 158 So. 581; Travelers Insurance Company vs. Bacon, 119 S. E. 458.

We also particularly refer to the case of Lahti vs. Terry and Tench Company, Inc., 148 N. E. 527. In this case the claimant was employed in the construction of a pier and was injured while on a floating raft in navigable waters. The Court of Appeals of New York held that the remedy was not under the compensation act as the locus of the accident was maritime whereas the service was not. This Court, however, reversed this decision in 273 U. S. 639 under the authority of Miller's Indemnity Underwriters vs. Nelson Boudreaux Braud, supra.

The state of Massachusetts held to this same effect in the case of Herbert's, 186 N. E. 554. The deceased in this case was sweeping a scow, fell overboard, and was drowned.

The State Court held that the remedy was under the Workmen's Compensation Act of the State of Massachusetts.

In the case of Alaska Packers Ass'n vs. Marshall, 95 Fed. 2d 279. The employer established a fishing season during the run of salmon for a period in the neighborhood of twenty days. For each schooner were two men who operated her to supply the cannery. Customarily these men were on their boats fishing from Monday to Saturday during the run. Each vessel was equipped with all paraphernalia needed for fishing. Once every twenty-four hours or more often, should occasion require, they reported to take their fish to one of several lighters anchored at strategic points, called stations. They were thus seamen as well as fishermen. While they were so engaged, after several days away from shore, a storm overtook and destroyed the schooner, the two employees, Erickson and Nelson, were drowned. It was held that the California Compensation Act applied.

We refer also to the case of Los Angeles Shipbuilding and Drydock Company vs. Industrial Accident Commission of California, 207 Pac. 416. In this case a marine-machinist was injured while installing machinery in a vessel that was being constructed by the employer. The vessel had never been in commission; it was an incompleted structure at the time of the injuries. It had, however, been launched and drawn up beside a dock for completion, where it was afloat and riding in navigable waters of the Los Angeles harbor at the time of the accident. An award for compensation was made by the industrial accident commission. The award was affirmed by the highest Court of California.

In the case of Zahler vs. Department of Labor and Industries, 217 Pac. 55, which is a Washington case, the deceased was working as a carpenter in the construction of a ship

which although unfinished had been launched and was floating in the navigable waters of Puget Sound. The Workmen's Compensation Law of the State of Washington was applied by the State Court.

We also refer to the case of Dewey Fish Company vs. Department of Labor and Industries of State of Washington, 41 Pac. 2d 1099.

In the instant case, the Circuit Court of Appeals for the Fourth District held that the Petitioner was not a seaman but did not pass on the question of jurisdiction. Frankel vs. Bethlehem-Fairfield Shipyard, Inc., 132 Fed. 2d 634. The vessel on which the Petitioner was working had not been completed. It was not in commission and had never assumed its place in commerce and navigation. The situation presented in this case is entirely different from that presented in the case of Baizley Iron Works vs. Span, 281 U. S. 222. In that case the injured man was working on a completed vessel, a vessel which had assumed its place in navigation and commerce. To have held in the Baizley case supra that the injured man was not a seaman within the meaning of the Jones Act, even though he was not a member of the crew and even though he performed other duties, would have created a state of chaos. This would have worked a manifest injustice on the owners and masters of foreign vessels as well as their employers. In view of the passage of the Longshoremen's and Harbor Workers' Act, the decision in the Baizley case, supra, becomes rather unimportant. Congress by the Longshoremen's and Harbor Workers' Act, has bridged the gap between the laws of the various states and the Jones Act. There is in the instant case no gap to bridge.

The Petitioner cites as authority that this Court has jurisdiction, the case of O'Donnell vs. Great Lakes Dredge and

Dock Company, 1942 term, U. S. Supreme Court volume 87, No. 8, page 456. In this case a seaman was injured while on shore. Petitioner apparently seeks to show that this case is authority that the Jones Act is broad and all embracing. On the contrary, this case illustrates that the Jones Act did apply because the injured man was a seaman. He could not apply for relief under the Workmen's Compensation Law of the State, as he was a seaman. Therefore, if he did not have a remedy under the Jones Act he could not recover. This case does not strengthen the contention of the Petitioner and is no precedent or authority for holding that the Petitioner in this case is entitled to proceed under the Jones Act.

3. Shipbuilding is a Matter of Local Concern.

Practically all of the cases cited under the second point of our argument refer to the fact that the matter at hand is one of local concern. The Petitioner advances in his brief what seems to us a rather inconsistent view. He states in effect that at the time it was decided the Rohde case, supra, was good law. He urges, however, that by reason of the present emergency, which necessitates the building of a great many more ships than were ever heretofore built at one time, and that in view of the fact that shipbuilding is at present one of the largest and most important industries of the country, shipbuilding is not a matter of local concern. From this argument it follows that after the present emergency is passed and when the shipbuilding is on a normal scale, then the decision of the Rohde case becomes applicable. Could anything create a greater state of confusion than this doctrine? It should be borne in mind that the vast majority of ship workers at the present time are not by trade ship workers but are such because of the present necessity. They have come

from all parts of the country to the various yards and consist of farmers, laborers, and in fact are from almost every class of employment. They are attracted to the shipyards by reason of the necessity of building ships. After this emergency they will go back to their former tasks. Could it be said with any logic that they, by virtue of merely working on an incompleted vessel which was lying in navigable water, are seamen? It would doubtless be admitted, and certainly this Court would take judicial notice of the fact, that a great many of these men come from parts of the country where there are no ships; and to hold that these men, simply by virtue of the single fact that at the time they were hurt were on a vessel, which though incompleted, was lying in navigable waters, are seamen, is not sound.

Shipbuilding is a matter of local concern when the true concept and meaning is followed. Since only the State of Maryland is involved in the instant case, the building of ships by the Respondent is of local concern.

CONCLUSION.

We urge that this Court has previously in a number of cases passed on the very question here involved, and therefore respectfully submit that the petition be denied.

Respectfully submitted,

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